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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1590

DONALD KUSTOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Donald Kustok, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

JURISDICTION.

The judgment of the Court of Appeals was entered on April 26, 1973. The jurisdiction of this court is invoked under Title 28, U.S. Code, Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW.

Where defendant was discharged under state law for failure to be tried within a specified time, designated by a state statute as an implementation of the right to Speedy Trial, and such discharge bars subsequent prosecution for the same act in the courts of that state, may defendant be prosecuted by the federal government for violation of 18 U.S.C. Sec. 659 for the same act, or does prosecution violate that provision of Sec. 659 that: "acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts"?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U.S. Constitution, Amendment V, provides in pertinent part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Illinois Constitution, Article 1, Section 10 provides in pertinent part:

> "No person shall . . . be twice put in jeopardy for the same offense."

Title 18, U.S. Code, Sec. 659 provides in pertinent part:

> "A judgment of conviction or acquittal on the merits under the law of any state shall be a bar to any prosecution under this section for the same act or acts."

Chapter 38, Section 103-5, Ill. Rev. Stat. provides in pertinent part:

> "Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days(*) from the date defendant demands trial . . ."

STATEMENT OF THE CASE.

Donald Kustok (hereinafter referred to as petitioner) and one Joseph McAdrian were indicted for violation of 18 USC § 659 for having possessed goods stolen from an interstate shipment.

Petitioner moved to dismiss the indictment based on his discharge in the Court of the State of Illinois where the State charge was based upon the same acts and facts as was the federal prosecution. In his motion for dismissal, he asserted that:

> ". . . defendant Kustok has been previously indicted for the same act and offense herein charged

(*) At the time of petitioner's trial, the then applicable statute specified 120 rather than 160 days.

by the May, 1968 Grand Jury of the Circuit Court of Cook County, Illinois, in General Case Number 68-1919 together with his present co-Defendant McAdrian, who was discharged under the 120-Day Statute (Chap. 38, Sec. 103-5, Ill. Rev. Stat.) by the Honorable Judge Sidney Jones of the Criminal Division of the Circuit Court of Cook County on July 8, 1969; that thereafter, Defendant Kustok stood ready for trial and demanded trial on numerous occasions before the Honorable Judge Felix Buoscio of the Criminal Division of the Circuit Court of Cook County and was unable to get the State to proceed with the case; that on December 11, 1969, the Defendant Kustok was discharged by Judge Felix Buoscio under the 120 day statute, (Chap. 38, Sec. 103-5, Ill. Rev. Stat.)" (A. 3-5)

The government did not dispute the factual basis of the assertions, but persuaded the trial court that such discharge did not invoke the applicable provisions of Section 659. The motion to dismiss was denied.

After a stipulation of facts, petitioner was convicted and placed on 2 years probation. Although petitioner stipulated to the government's case, he preserved for review the court's order denying his pretrial motion to dismiss the indictment. (A. 14)

REASONS FOR GRANTING WRIT.

Petitioner's conviction violates the mandate of 18 U.S.C. Sec. 659 that "acquittal on the merits under the law of any State" bars federal prosecution for the same act, inasmuch as his discharge under state law because he was not tried within a specified time, designated by state statute as an implementation of the right to a speedy trial, must be held an "acquittal on the merits under the law of any State," since such discharge bars further state prosecution and is a discharge "on the merits" under state law. Certiorari should be granted to resolve the question whether such "speedy trial" discharge under state law bars federal prosecution under Sec. 659.

This is a case of first impression. There is no decision of the United States Supreme Court interpreting the pertinent language of Title 18, Sec. 659, U.S.C., to-wit:

> "A judgment of cinviction or *acquittal on the merits under the law of any State shall be a bar to any prosecution under this section* for the same act or acts." (Emphasis added.)

Simply stated, the issue before this Court is whether a discharge pursuant to a state statute which has as its function the implementation of a defendant's speedy trial rights, in a state where such discharge bars further prosecution and is a discharge on the merits under the law of the state, invokes the language of Sec. 659.

The Court of Appeals in this case adhered to the position that "a dismissal of a federal charge because of denial of speedy trial would bar a second federal prosecution." App. A., pp. 1a-2a, citing *Mann* v. *United States*, 304 F.2d 394 (D.C. Cir. 1962), and recognized that "Speedy trial discharge pursuant to Illinois stat-

utes and case law would bar further state prosecution," citing *People* v. *Heider*, 225 Ill. 347, 80 N.E. 291 (1907). App. A., p. 1a. Nonetheless, the court held that: "In our view the policy reasons for those results are different from the reasons Congress had in mind in enacting the critical provision in 659. . . ." App. A., p. 2a.

The opinion of the Seventh Circuit, which is the first decision of any Court of Appeals interpreting the pertinent language of 18 Sec. 659, is contrary to dicta in *Cohn* v. *United States*, 366 F.2d 363 (9 Cir. 1966), and to decisions of this Court (*United States* v. *Oppenheimer*, 242 U.S. 85, 87-88, 61 L.Ed. 161 (1916)), and other federal courts interpreting the effect of a discharge due to a violation of a defendant's right to speedy trial (*White* v. *United States*, 377 F.2d 948 (D.C. Cir. 1969)). Nor is the court's conclusion as to congressional intent supported by any congressional reference, committee debate, or any other material.

In *United States* v. *Oppenheimer*, 242 U.S. 85, 87, 88, 61 L. Ed. 161 (1916), this Court held that a discharge based on failing to bring defendant to trial within the time provided by the statute of limitations is a discharge on the merits. There the Court fully discussed the rationale that such a discharge is a discharge on the merits as follows:

> "Upon the merits the proposition of the government is that the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in

jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguard of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the Statute of Limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue (*United States* v. *Kissel*, 218 U.S. 601, 610, 54 L. ed. 1168, 1179, 31 Sup. Ct. Rep. 124), but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *State* v. *Fields*, 106 Iowa 406, 76 N.W. 802; Whart. Crim. Pl. & Pr. 9th ed. § 406.

Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law, and one judgment, that he is free as matter of substantive law is as good as another. A plea of the Statute of Limitations is a plea to the merits. (*United States* v. *Barber*, 219 U.S. 72, 78, 55 L. ed. 99, 101, 31 Sup. Ct. Rep. 209), and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court hav-

> ing jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.'"

The underlying philosophy of *Oppenheimer*—that a discharge due to failure to bring defendant to trial within the time set by a statute which implements the right to speedy trial is a discharge on the merits, preventing defendant from again being brought to trial—has been held controlling in other speedy trial, though not "statute of limitations," cases.

In *White* v. *United States,* 377 F.2d 948 (D.C. Cir. 1967), the court of appeals held that where a cause was dismissed at trial with prejudice, this dismissal constituted an adjudication which barred another prosecution for the same offense. In *White,* the court cited as authority, *United States* v. *Oppenheimer,* 242 U.S. 85, 61 L. Ed. 161 (1916). The court's reliance on *Oppenheimer* equated a "speedy trial discharge with prejudice" to a discharge due to violation of the statute of limitations.

Also supporting this position is *Mann* v. *United States,* 304 F.2d 394 (D.C. Cir. 1962), where the court stated:

> "We also agree that a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense. While there appears to be no express articulation of the rule in the reported decisions, it is the unspoken premise of all the cases involving the Speedy Trial Clause. It is, moreover, a necessary rule if the constitutional guarantee is

not to be washed away in the dirty water of the first prosecution, leaving the government free to begin anew with clean hands." *Id.* at 397.

The decisions of *Oppenheimer, Mann* and *White,* all stand for the proposition that a discharge based on a violation of either rules or statutes enacted to implement the speedy trial provisions of the constitution is a discharge on the merits. Such is the purpose of Sec. 103-5 of Chap. 38, Ill. Rev. Stat.

In *Cohn* v. *United States,* 366 F.2d 363 (9 Cir. 1966), the issue was whether a discharge for a denial of speedy trial had the effect of an acquittal on the merits. Although the court held no such effect resulted in the case there on appeal, in distinguishing the cases relied upon by defendant, it held that such effect occurs under the statutory scheme in Illinois. The court stated:

"Appellant asserts this question has never been presented to a United States Circuit Court of Appeals. He therefore relies on the language of certain state court cases, (illustrated by *People ex rel. Nagel* v. *Heider,* 225 Ill. 347, 80 N.E. 291, 11 L.R.A., N.S., 257 (1907)), and *Mann* v. *United States,* 113 U.S. App. D.C. 27, 304 F. 2d 394 (1962).

We point out, however, that in the *Heider* case, the Illinois legislature had seen fit to give effect to Section 9 of Article II of the Illinois Constitution by enacting Section 18 of Division 13 of the Criminal Code, to-wit:

'Any person committed for a criminal • • • offense, and not admitted to bail, and not tried • • • within four months of the commitment • • • [if within the term of court], or • • • at or before the first term commencing after said four months, shall be set at liberty by the court, unless [etc.] • • •'"

The court by its distinction adopted as valid the proposition that under Illinois law, a discharge for denial of speedy trial is a discharge on the merits, acting to bar further prosecution.

Considering that the common purpose of the Illinois statute and the rule of *Oppenheimer, Mann,* and *White* is to implement the right to speedy trial by preventing a second trial after a "speedy trial" discharge, no valid distinction justifies the holding that defendant's federal prosecution is not barred pursuant to Sec. 659 after his speedy trial discharge pursuant to the laws of Illinois.

The opinion of the Seventh Circuit relies on "unstated" policy reasons, and on non-existent material as to the intent of Congress. As admitted by the government in its Brief (p. 5), there is nothing indicating congressional intent in enacting Sec. 659. If there were policy reasons, or evidence of legislative intent, the court would have so stated in its opinion.

The very language of the section does not permit the conclusion reached by the court. If Congess intended to limit section 659, Title 18, U.S.C., solely to causes where there had been an acquittal on the issue of guilt or innocence, it would have been quite easy for such words to have been used. The very use of the words, "on the merits *under the law of any State,*" demonstrates that something broader than just guilt or innocence was the standard to be used. For if the issue were merely that of guilt or innocence, there was no need for the words, "under the law of any State." In their normal usage, these words contain the idea of a State determination of what amounts to an acquittal on the merits. And under law

of Illinois, a speedy trial discharge is a discharge on the merits. *People* v. *Heider,* 225 Ill. 347, 80 N.E. 291 (1907).

Section 659 is at most ambiguous. When neither the wording of a statute nor its legislative history points to the clear meaning of an ambiguous statute, the Court must interpret on the theory of lenity, and thus, in favor of defendant. *Ladner* v. *United States,* 358 U.S. 169, 2 L. Ed. 2d 199 (1957).

Any ambiguity must be resolved in favor of defendant. In *Toussie* v. *United States,* 397 U.S. 112, 122, 25 L. Ed. 2d 156, 165 (1970), the court stated:

> "As we have said before: 'When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.'"

The double jeopardy provision of the U.S. Constitution has not been held to bar federal prosecutions after state acquittals. However, Congress recognized that in most cases involving theft from interstate shipments (Title 18, Sec. 659), prosecution would be left to the states. To avoid unfairness to defendants, it chose to legislate a statutory double jeopardy provision. It did so in light of the federal rule regarding speedy trial discharges and such rule was no doubt incorporated by implication.

The issue here raised, being of first impression, is of great importance, considering the Court's desire to "speed up" the administration of criminal justice. The issue will no doubt arise often and should be resolved by this Court.

CONCLUSION.

Petitioner respectfully prays that the Court grant the Writ of Certiorari, and reverse his conviction.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

April 26, 1973

(Argued December 11, 1972)

ORDER

On November 8, 1971, Donald Kustok and Joseph McAdrian were convicted of violating 18 U.S.C. §659, dealing with embezzlement, etc. of goods moving as an interstate shipment of freight. They appealed. The two points they argue, and our disposition of them, follow:

1. *Effect of state prosecution.* §659 provides that a "judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts." Defendants were first prosecuted in an Illinois court for their involvement with the stolen goods. They were not brought to trial within the 120 day period prescribed by the law of Illinois, ch. 38, §103-5, Ill. Rev. Stats., and were accordingly discharged. They argue that the state discharge constituted an "acquittal on the merits."

It does appear that the discharge barred a second prosecution for the same act in any Illinois court, *People* v. *Heider*, 225 Ill. 347, 80 N.E. 291 (1907), and that a dismissal of a federal charge because of denial of a speedy trial would bar a second federal prosecution. *Mann* v. *United States*,

304 F.2d 394 (D.C. Cir. 1962). In our view the policy reasons for those results are different from the reasons Congress had in mind in enacting the critical provision in §659, and do not control the interpretation of the phrase "acquittal on the merits." We conclude that the termination of a state prosecution on account of delay is not "on the merits" and that the language in §659 does not bar subsequent federal prosecution.

2. *Suppression of certain evidence.* The theory of the government's case was that six tape recorders were stolen the morning of February 6, 1968 from the dock of ICX, where both defendants were employed. McAdrian put them into the trailer which Kustok hauled that day. That afternoon the defendants met on a road near a forest preserve, Kustok being in his tractor-trailer unit and McAdrian in his Ford convertible. The recorders were transferred to the Ford, in which they were later found. Defendants argue they were entitled to suppression of crucial evidence.

On February 6, 1968, about 5:15 p.m., police officers on patrol in a squad car observed a semi-trailer with a Ford convertible stopped behind it. Officer Beck saw a person standing on the back of the truck handing a box to a person standing on the ground. Beck was ¼ mile away and approached slowly. He saw the recipient place the box in the convertible, the person entered their vehicles and began to move west. After an intersection where both turned north, Beck put on his Mars light and the convertible stopped. The officers told the driver to wait, caught up with the truck, and caused it to stop. The driver, Kustok, produced identification, said he had stopped to inquire directions of the other driver, permitted an inspection of his truck, which produced nothing, and was permitted to proceed.

The officers went back, but the convertible was no longer where they had stopped it. They noticed and followed tracks into the woods, and found the convertible with its hood, doors, and trunk open, and no one present. The tape recorders were evident in the open trunk and in the back seat of the convertible. The car turned out to belong to McAdrian.

Knowledge that Kustok was the driver of the truck, and the detection of the tape recorders in McAdrian's automobile came about because of the stopping of the two vehicles. It is argued that these were arrests without probable cause, and that all evidence flowing therefrom must be suppressed.

The road where this occurred was a bypass, only three quarters of a mile long, through a wooded forest preserve area. Beck, an officer of seven years experience, who was very familiar with the road, and frequently traveled it both on duty and off duty, had never seen a tractor-trailer unit on it. When he had observed the two vehicles and the box being transferred from the trailer to the convertible, he had suspected a highjacking.

Under the principle stated in *Terry* v. *Ohio,* 392 U.S. 1, 22 (1968) and discussed and applied in *Adams* v. *Williams,* 407 U.S. 143, 145 (1972), the circumstances observed by Beck justified the stopping of the two vehicles for determination of identities and brief inquiry, without reaching the standard of probable cause. See *United States* v. *Catalano,* 450 F.2d 985, 987 (7th Cir., 1971).

The clerk of this court is directed to enter judgment affirming the judgments appealed from.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1590

DONALD KUSTOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his federal prosecution under 18 U.S.C. 659[1] was barred by the previous dismissal of state charges based on an Illinois statute requiring that a defendant be tried within 120 days from the date he demands trial.[2]

Before trial in the United States District Court for the Northern District of Illinois, petitioner moved to dismiss

[1] 18 U.S.C. 659 provides in pertinent part:

> A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

[2] Smith-Hurd Ill. Anno. Stats., Ch 38, § 103-5(b), provides in pertinent part:

> Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial * * *.

At the time of petitioner's trial, the then-applicable version of this statute specified 120 rather than 160 days.

his federal indictment because of the dismissal, under the Illinois 120-day statute, of state charges based on the same acts charged in the federal indictment. The district court denied petitioner's motion to dismiss. After a bench trial, petitoner was convicted of having possessed goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. He was placed on two years' probation. The court of appeals affirmed (Pet. App. A).

Petitioner does not dispute the facts in this case. The evidence showed that a Cook County police officer observed petitioner standing on the rear of a tractor-trailer in a secluded forest preserve area and saw him hand a box to a co-defendant, McAdrian, who then placed the box inside his car (Tr. 7-11, 86). McAdrian fled when the officer sought to question him and petitioner about their activity (Tr. 20-24). Thereupon, the officer searched McAdrian's car and found several boxes of stolen tape recorders (Tr. 27).

Petitioner's argument that a dismissal for prosecutorial laxity is a "judgment of * * * acquittal on the merits," which, under the terms of Section 659, would bar federal prosecution, is not supported by either logic or authority. In normal legal usage, a judgment on the merits requires some consideration of the circumstances of a case and would not include a judgment based on matters of practice or procedure, such as want of prosecution.[3]

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[3] II *Bouvier's Law Dictionary* (Rawle's 3d rev., 1914) defines the words "Judgment on the Merits" as follows:

> [O]ne rendered after argument and investigation, and when it is determined which party is in the right, as distinguished

This Court shed some light on the matter in *United States* v. *Marion*, 404 U.S. 307, in which jurisdiction to entertain the government's appeal depended on a finding that the defendants had not been put in jeopardy prior to dismissal of the indictment on speedy trial grounds. The Court stated (*id.* at 312):

> The motion to dismiss rested on grounds [undue delay prior to indictment] that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance * * *.

While it might be argued that, under Section 659, it is the State's characterization of the nature of the dismissal that controls, the Illinois courts have never indicated that a discharge under the 120-day rule should be considered a general acquittal on the merits. In *People* v. *White*, 98 Ill. App. 2d 1, 3-4, a subsequent prosecution for violation of parole was allowed based on facts charged in an indictment which was dismissed under the 120-day rule. The court stated, "discharge of the defendant under the 120-day rule does nothing so far as determining the truth of the facts in the May 17 complaint." *People ex rel Nagel* v. *Heider*, 225 Ill. 347, 80 N.E. 291, alluded to by petitioner, only indicated that the purposes of expedition advanced by the statue would be defeated if the accused could be reindicted for the same offense after such a dismissal.

In the present case, however, no policy would be served by allowing defendant's dismissal. The federal

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from a judgment rendered upon some preliminary or merely technical point, or by default, and without trial.

See also *Goddard* v. *Security Title Insurance and Guarantee Co.*, 83 P. 2d 24, 27-28 (Calif.); *Beam* v. *Almond*, 271 N.C. 509, 515, 157 S.E. 2d 215, 221.

policy of deferral to state prosecution applies only when guilt or innocence has been determined. State prosecutorial inertia should not bar federal prosecution when no federal standard has been breached. See Fed. R. Crim. P., Rule 48(b).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

[4]Federal law is liberal in this regard. A dismissal under Rule 48 (b) does not bar subsequent prosecution. *Cohen* v. *United States*, 366 F. 2d 363, 367 (C.A. 9).